

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED

10-04-07
04:59 PM

Order Instituting Rulemaking on the Commission's Own
Motion to Assess and Revise the Regulation of
Telecommunications Utilities

Rulemaking 05-04-005
(Filed April 7, 2005)

Rulemaking for the Purpose of Revising General Order
96-A Regarding Informal Filings at the Commission

Rulemaking 98-07-038
(Filed July 23, 1998)

**MOTION OF THE UTILITY REFORM NETWORK AND THE DIVISION OF
RATEPAYER ADVOCATES TO DISMISS AT&T CALIFORNIA'S "PETITION TO
MODIFY D.01-09-058"**

William R. Nusbaum
Senior Telecommunications Attorney
TURN
711 Van Ness Avenue, Suite 350
San Francisco, CA 94102
Tel: 415/929-8876 ext. 309
Fax: 415/929-1132
bnusbaum@turn.org

Hien Vo
Staff Counsel
Division of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Ave., Room 4107
San Francisco, CA 94102
Tel: 415-703-3651
Fax: 415-703-4432
hcv@cpuc.ca.gov

October 4, 2007

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the Commission's Own
Motion to Assess and Revise the Regulation of
Telecommunications Utilities

Rulemaking 05-04-005
(Filed April 7, 2005)

Rulemaking for the Purpose of Revising General Order
96-A Regarding Informal Filings at the Commission

Rulemaking 98-07-038
(Filed July 23, 1998)

**MOTION OF THE UTILITY REFORM NETWORK AND THE DIVISION OF
RATEPAYER ADVOCATES TO DISMISS AT&T CALIFORNIA'S "PETITION TO
MODIFY D.01-09-058"**

In accordance with Rule 11.2 of the Commission's Rules of Practice and Procedure, The Utility Reform Network ("TURN") and the Division of Ratepayer Advocates ("DRA") hereby move for an order dismissing AT&T California's ("AT&T") "Petition to Modify D.01-09-058", or providing the alternative relief requested below.

I. Introduction

In granting the request for evidentiary hearings on the issues raised by protests to AT&T's Rule 12 advice letters, the Commission found that "AT&T's Rule 12 Advice Letters are in substance equivalent to a petition to modify a prior Commission decision."¹ The Ruling also

¹ Assigned Commissioner's and Administrative Law Judge's Ruling, 9/11/07, p. 2 ("Ruling"). Given this finding, TURN and DRA will refer to the instant proceeding as a petition to modify D.01-09-058.

held that “AT&T bears the burden of proof to modify our past decision D.01-09-058.”² In addition, in detailing the scope of issues to be considered the Commission identified four issues including:

c. Whether AT&T has reformed its processes and procedures to ensure that the abuses found in C.98-04-004 do not occur.³

Pursuant to the schedule established by the Ruling, AT&T filed the Opening Testimonies of Michelle O. Gomez and Professor Rashi H. Glazer on October 1, 2007. In its testimony, however, AT&T failed to address, much less provide any substantial evidence that it had in fact “reformed its processes and procedures to ensure that the abuses found in C.98-04-004 do not occur” (i.e. “Issue c”). Given AT&T’s failure to address a fundamental issue in this proceeding and therefore its failure to meet its requisite burden of proof on that issue, TURN and DRA respectfully request that AT&T’s petition to modify D. 01-09-058 be dismissed.

In the alternative, TURN and DRA request that the Commission treat AT&T’s failure to present its case on “Issue c” in direct testimony as an admission by AT&T that it does not have processes and procedures in place to prevent the abuses found in C.98-04-004 from occurring in the future. Thus, the Commission should find against AT&T on this issue and, consistent with such a finding, prevent AT&T from addressing “Issue c” in rebuttal testimony and order accordingly that AT&T may not present in rebuttal any claims and evidence that it could have filed in direct testimony relating to “Issue c.”

² Ruling, p. 5. See also Assigned Commissioner’s Ruling on Hearings Regarding AT&T’s Advice Letters and Ex Parte Ban, 8/6/07, p. 7 (“ACR”).

³ Ruling, p. 3.

Given the extremely short schedule for this proceeding, TURN and DRA also request, in the concurrently filed Motion to Shorten Time for Response, that any AT&T response to the instant Motion to Dismiss be filed no later than October 8, 2007.

II. DISCUSSION

Rule 11.2 of the Commission's Rules of Practice and Procedure provides that:

A motion to dismiss a proceeding based on the pleadings (other than a motion based upon a lack of jurisdiction) shall be made no later than five days prior to the first day of hearing.

The Commission has construed motions to dismiss and motions for summary judgment in a similar way, relying in large part on the California Code of Civil Procedure ("Code Civ. Proc.") § 437c to inform the Commission's consideration of such motions.⁴ Code Civ. Proc. § 437c provides in pertinent part that:

The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In the instant case, AT&T was clearly on notice that "Issue c" is squarely within the scope of this proceeding and that AT&T has the burden to demonstrate that it has reformed its processes and procedures to ensure that the abuses similar to those found to have occurred in C.98-04-004 do not occur in the future. "Issue c" is critical to this proceeding. AT&T was found to have engaged in "abusive" marketing practices on a recurring, recidivistic basis. In response,

⁴ See *Westcom Long Distance, Inc. v. Pacific Bell et al*, D.94-04-082, 54 CPUC 2d 244,249; *County Sanitation District No. 2 of Los Angeles County vs. Southern California Edison Company*, D.01-02-071, 2001 Cal. PUC. LEXIS 146, *7-9; and *Reclamation District No. 2038 and Lower Jones Company vs. Pacific Gas and Electric Company*, D. 07-01-014; 2007 Cal. PUC LEXIS 7, *5-7.

the Commission imposed certain requirements on AT&T's marketing procedures. While AT&T has attempted to make a showing that the marketing requirements are unnecessary and harmful to the carrier, nothing in its direct testimony addresses whether AT&T has implemented processes and procedures to ensure that the company does not, once again, engage in the prohibited conduct. "Issue c" is analogous to a "safety net" providing the Commission and consumers with some assurances that AT&T will not, in the future, behave in an unacceptable, harmful manner. As noted above, the Ruling established that there were four issues that AT&T has the burden of proof to justify any modification of D.01-09-058. The Ruling did not say AT&T had the option of choosing to only meet its burden on those issues that it saw fit to address in its testimony, nor did it suggest that the burden was AT&T's for some of the issues but not all of them. AT&T has failed to meet its burden of making an affirmative showing on "Issue c", and its failure to do so should result in the petition to modify being dismissed and D.01-09-058 remaining unmodified.

At a minimum, AT&T's failure to present evidence on "Issue c" should be treated as an admission that it has not "reformed its processes and procedures to ensure that the abuses found in C.98-04-004 do not occur." As such, "Issue c" is no longer a triable issue of material fact and thus clearly meets the requirements for a motion for summary judgment in favor of TURN and DRA, at least on this particular issue. Certainly AT&T must be prohibited from addressing "Issue c" in its rebuttal testimony.⁵ This would preclude AT&T from presenting any claims and

⁵ It is well-established Commission practice that a petitioner has the burden of justifying its case in direct testimony (see, for example, D.04-03-039, *mimeo* at 84-85) where the Commission held that "Providing the basic justification in rebuttal is unfair, since parties are not generally given the opportunity to respond to rebuttal with testimony of their own . . . When the utility has the evidentiary burden, we caution against the use of rebuttal testimony to provide the basic justification. As a matter of fairness, we must seriously consider either striking such testimony or extending the proceeding, at the utility's risk, to allow for responsive testimony from the other parties."

evidence that it could have filed in direct testimony relating to “Issue c.” Instead, the focus on this issue should be on the appropriate remedy given the conclusion that no such processes or procedures currently exist, with review of proposals from TURN, DRA or other parties to remedy AT&T’s failure to develop processes/procedures to prevent a recurrence of its abusive marketing practices.

III. CONCLUSION

For the reasons stated above, TURN respectfully requests that the Assigned ALJ promptly take the following actions:

- Grant TURN and DRA's Motion to Dismiss AT&T's petition to modify D. 01-09-058.
- In the alternative, find that: AT&T has failed to meet its burden of proof with respect to "Issue c"; hold in favor for TURN and DRA on "Issue c"; and prohibit AT&T from addressing "Issue c" in its rebuttal testimony, including presenting any claims and evidence that it could have filed in direct testimony relating to "Issue c."

Date: October, 4, 2007

Respectfully submitted,

By: _____/S/_____

William R. Nusbaum

William R. Nusbaum
Senior Telecommunications Attorney
TURN
711 Van Ness Avenue, Suite 350
San Francisco, CA 94102
Tel: 415/929-8876 ext. 309
Fax: 415/929-1132
bnusbaum@turn.org

Hien Vo
Staff Counsel
Division of Ratepayer Advocates
California Public Utilities Commission
505 Van Ness Ave., Room 4107
San Francisco, CA 94102
Tel: 415-703-3651
Fax: 415-703-4432
hcv@cpuc.ca.gov

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the Commission's Own
Motion to Assess and Revise the Regulation of
Telecommunications Utilities

Rulemaking 05-04-005
(Filed April 7, 2005)

Rulemaking for the Purpose of Revising General Order
96-A Regarding Informal Filings at the Commission

Rulemaking 98-07-038
(Filed July 23, 1998)

[PROPOSED] ADMINISTRATIVE LAW JUDGE'S RULING

In accordance with its Rules of Practice and Procedure, the California Public Utilities Commission ("Commission") has considered the Motion of TURN and DRA to Dismiss, filed October 4, 2007 in the above captioned proceeding. For good cause shown, the Commission hereby ORDERS as follows:

1. The Motion of the Utility Reform Network and the Division of Ratepayer Advocates shall be granted.

Dated _____, 2007 at San Francisco, California.

Administrative Law Judge

CERTIFICATE OF SERVICE

I, Larry Wong, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On October 4, 2007 I served the attached:

**MOTION OF THE UTILITY REFORM NETWORK AND THE DIVISION OF
RATEPAYER ADVOCATES TO DISMISS AT&T CALIFORNIA'S "PETITION TO
MODIFY D.01-09-058"**

on all eligible parties on the attached lists to **R.05-04-005 and R.98-07-038**, by sending said document by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List.

Executed this October 4, 2007, at San Francisco, California.

/s/

Larry Wong

Service List for R.05-04-005 & R.98-07-038

abb@eslawfirm.com	chc@cpuc.ca.gov
Adam.Sherr@qwest.com	chr@cpuc.ca.gov
adl@lrolaw.com	des@cpuc.ca.gov
ahammond@usc.ed	dlf@cpuc.ca.gov
ahanson@o1.com	drp@cpuc.ca.gov
ahk4@pge.com	flc@cpuc.ca.gov
aisar@millerisar.com	fnl@cpuc.ca.gov
anitataffrice@earthlink.net	hey@cpuc.ca.gov
ann.johnson@verizon.com	hmm@cpuc.ca.gov
anna.kapetanakos@att.com	jar@cpuc.ca.gov
anna.sanchou@pactel.com	jet@cpuc.ca.gov
ashm@telepacific.com	jjs@cpuc.ca.gov
astevens@czn.com	jww@cpuc.ca.gov
athomas@newenergy.com	jst@cpuc.ca.gov
atrial@sempira.com	kar@cpuc.ca.gov
bgranger@pacbell.mobile.com	kjb@cpuc.ca.gov
blaising@braunlegal.com	kot@cpuc.ca.gov
bnusbaum@turn.org	lgx@cpuc.ca.gov
case.admin@sce.com	lwt@cpuc.ca.gov
cborn@czn.com	man@cpuc.ca.gov
chris@cuwcc.org	mca@cpuc.ca.gov
ckomail@pacbell.net	mlm@cpuc.ca.gov
clower@earthlink.net	ndw@cpuc.ca.gov
cmailloux@turn.org	nxb@cpuc.ca.gov
cpuc.contact@realtelephone.net	pje@cpuc.ca.gov
david.discher@att.com	rff@cpuc.ca.gov
david@simpsonpartners.com	rmp@cpuc.ca.gov
deyoung@caltel.org	rs1@cpuc.ca.gov
dhaddock@o1.com	sjy@cpuc.ca.gov
diane_fellman@fpl.com	skw@cpuc.ca.gov
ditop@enpnet.com	tad@cpuc.ca.gov
dlee@snavely-king.com	tjs@cpuc.ca.gov
don.eachus@verizon.com	wej@cpuc.ca.gov
don@uutlaw.com	wit@cpuc.ca.gov
douglas.garrett@cox.com	
douglass@energyattorney.com	
ed.gieseeking@swgas.com	
edwardoneill@dwt.com	
elaine.duncan@verizon.com	
elara@centrolafamilia.org	
enriqueg@lif.org	
ens@loens.com	
esther.northrup@cox.com	
fassil.t.fenikile@att.com	
fpc_ca@pacbell.net	
g.gierczak@surewest.com	
gblack@cwclaw.com	
gdiamond@covad.com	
gj7927@att.com	
gregkopta@dwt.com	

gregory.castle@att.com
grs@calcable.org
heidi_sieck-williamson@ci.sf.ca.us
hgildea@snavely-king.com
info@tobiaslo.com
jacque.lopez@verizon.com
jadine.louie@att.com
james.young@att.com
jarmstrong@goodinmacbride.com
jbloom@winston.com
jchicoi@czn.com
jeff.wirtzfeld@qwest.com
jesus.g.roman@verizon.com
jim@tobinlaw.us
john_gutierrez@cable.comcast.com
jpc2@pge.com
jpeck@semprautilities.com
jr2136@camail.sbc.com
jsqueri@goodinmacbride.com
judypau@dwt.com
jwiedman@goodinmacbride.com
katherine.mudge@covad.com
katienelson@dwt.com
kdavis@o1.com
kelly.faul@xo.com
kevin.saville@frontiercorp.com
kim.logue@qwest.net
Kristin.L.Jacobson@sprint.com
lex@consumercal.org
ll@calcable.org
lmb@wblaw.net
Marjorie.Herlth@Qwest.com
marklegal@sbcglobal.net
mbrosch@utilitech.net
mday@goodinmacbride.com
mflorio@turn.org
mgomez1@bart.gov
michael.backstrom@sce.com
michael.sasser@att.com
Mike.Romano@Level3.com
mjoy@aopl.org
mmattes@nossaman.com
mmulkey@arrival.com
mp@calcable.org
mschreiber@cwclaw.com
mshames@ucan.org
mtobias@mlawgroup.com
mwand@mofo.com
mzafar@semprautilities.com
nedya.campbell@att.com
nelsonya.causby@att.com

nlubamersky@telepacific.com
npedersen@hanmor.com
palle_jensen@sjwater.com
pcasciato@sbcglobal.net
ppham@mofo.com
pszymanski@sempra.com
pucservice@dralegal.org
putzi@strangelaw.net
ralf1241a@cs.com
randy.chinn@sen.ca.gov
rcosta@turn.org
rdiprimio@valencia.com
rex.knowles@xo.com
rl@comrl.com
robbie.ralph@shell.com
robertg@greenlining.org
robin.blackwood@verizon.com
rschmidt@bartlewells.com
rtanner@scwater.com
rudy.reyes@verizon.com
sbergum@ddtp.org
scratty@adelphia.net
sheila.harris@integratelecom.com
sheila@wma.org
slafond@ci.riverside.ca.us
sleeper@steefel.com
smalllecs@cwclaw.com
stephen.h.kukta@sprint.com
steve.bowen@bowenlawgroup.com
strange@strangelaw.net
suzannetoller@dwt.com
Terrance.Spann@hqda.army.mil
tguster@greatoakswater.com
thaliag@greenlining.org
thomas.long@sfgov.org
thomas.selhorst@att.com
tlmurray@earthlink.net
tmacbride@goodinmacbride.com
tom@ucons.com
tregtremont@dwt.com
valerie.ontiveroz@swgas.com
vvasquez@pacificresearch.org
william.weber@cbeyond.net